

## Open Meeting Law Training



Sarah Bradley, Senior Deputy Attorney General  
[sbradley@ag.nv.gov](mailto:sbradley@ag.nv.gov)

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## Representing the State of Nevada

"Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes the law-breaker, it breeds contempt for law; it invites every man to become a law unto himself." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, L., dissenting).

We owe a fiduciary duty to the public. *U.S. v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (public officials inherently owe a fiduciary duty to public to make governmental decisions in the public's best interest); see also NRS 281A.020(1)(a) (public office is public trust held for the sole benefit of the people).

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## Open Meeting Law (NRS Chapter 241)

"In enacting this chapter, the Legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010(1).

Open meetings are essential to democracy.

"The exceptions provided to this chapter, and electronic communication, must not be used to circumvent the spirit or letter of this chapter to deliberate or act, outside of an open and public meeting, upon a matter over which the public body has supervision, control, jurisdiction or advisory powers." NRS 241.016(4).

The spirit and policy behind the OML favors open meetings and any exceptions thereto should be strictly construed. *McKay v. Board of Supervisors*, 102 Nev. 644, 730 P.2d 438 (1986).

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## Open Meeting Law (NRS Chapter 241)

Public bodies working on behalf of Nevada citizens must conform to statutory requirements in open meetings under an agenda that provides full notice and disclosure of discussion topics and any possible action. *Sandoval v. Board of Regents*, 119 Nev. 148, 67 P.3d 902 (2003).

Deliberation and action must be properly noticed and taken openly. NRS 241.010.

Action is only taken by the body as a whole; members have no individual decision-making powers and may only speak on behalf of the body if authorized to do so during an open meeting.

To the extent a multimember group is appointed by a public body and given the task of making recommendations to that public body, that group is also a "public body" subject to the OML. NRS 241.015(4).

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## What is a Meeting?

NRS 241.015 says:

**Quorum** of members of a public body *gathering* together with: **Deliberation** toward a decision; and/or

**Action:** which means making a decision, commitment or promise over a matter within the public body's supervision, jurisdiction, control or advisory power.

A quorum is a simple majority of the total body (NRS 241.015(5)); action requires majority vote of members present (NRS 241.015(1)).

A gathering of a quorum at a social function is **not** a meeting **as long as** there is no deliberation or action.

An attorney-client conference on potential and existing litigation is **not** a meeting **as long as** there is no action.

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## Meeting Notice and Agenda - NRS 241.020

- Time, place and location of meeting
- List of locations posted
- Agenda consisting of a **clear and complete** statement of the topics scheduled to be considered
- Action items clearly denoted as "for possible action"
- Public comment at beginning/end or before any action item
- Posted at office of the public body *or* location of meeting *and* 3 other separate, prominent places within Nevada
- Posted at public body website *and* at [www.notice.nv.gov](http://www.notice.nv.gov)
- Posted no later than 9AM of the third working day before the meeting

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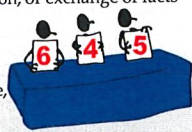
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## Critical Definitions

• **Deliberation** means “collectively to examine, weigh and reflect upon the reasons for or against the action. The term includes, without limitation, the collective discussion, or exchange of facts preliminary to the ultimate decision.”

- **Action** means making a decision by vote, includes promise or commitment;
  - But no secret ballots or secret promises
  - Action is an affirmative vote by a majority of the members during a public meeting; there is a difference between elected body and appointed body requirements for action.



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## “Deliberation” / “Discussion,” are they Synonymous?



- In NRS 241.020(2)(d)(3)(II), it states that public comment must come after the public body “discusses” the action item, but before it takes action.
- **Deliberation** is the collective discussion or exchange of facts, prior to ultimate decision that constitutes “deliberation.”

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## “Working Day” means M - F

- “Working day” includes Monday through Friday excluding holidays. NRS 241.015(6).
- “[E]very day of the week, except Saturday and Sunday and any day declared to be a legal holiday pursuant to NRS 236.015.”



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## What is "Clear and Complete?"

Agenda items must be **clear and complete**. NRS 241.020(2)(d)(1).

A **higher degree of specificity** is necessary for topics of **substantial public interest**. *Sandoval*, 119 Nev. at 154-55, 67 P.3d at 906. Factors to consider include:

- Does topic generate public comment?
- Does topic generate debate among members of body?
- Does topic generate media interest/coverage?

Agenda items such as "member comments" and "reports" are problematic in that these invite discussion and possible deliberation on topics that are not set forth on the agenda. Any topic that is raised should be included on a future agenda before any discussion can ensue.

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If a public body intends to take administrative action **regarding** a person ... the name of that person must appear on the agenda.

- An agenda must contain the name of the person if a public body will consider whether to take administrative action **regarding** that person during any portion of the meeting
- OAG interprets "person" to mean a natural person. See NRS 241.034. (Contains notice requirement in addition to agenda requirement.)



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## Meeting Notice and Agenda

- Name and contact information for person the public may request supporting materials from and locations where the supporting material is available.
- If any portion of the meeting will be closed to consider the character, alleged misconduct or professional competence of a person, the name of the person.
- If the public body will consider whether to take administrative action regarding a person, the name of the person.
- Notification that items on the agenda may be taken out of order, may be combined for consideration, and may be removed from the agenda or delayed for discussion at any time.
- Any restrictions on comments by the general public.

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## Additional Requirements

Public bodies shall make reasonable efforts to assist and accommodate persons with physical disabilities desiring to attend. NRS 241.020(1).

Notice to persons who have requested notice of meetings pursuant to NRS 241.020(3)(c).

Additional notice requirements for consideration of character, misconduct, competence, or physical or mental health: 5 days personal service or 21 days certified mail. NRS 241.033. This would not apply to passing remarks.

An emergency meeting may only be called where the need to act upon a matter is truly unforeseen and circumstances dictate that immediate action is required. NRS 241.020(9).

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## Additional Requirements

One copy of the agenda, any supporting materials, and the recording of a public meeting be provided at no cost to a member of the public requesting them and *at least* one copy made available at the meeting. NRS 241.020(6); NRS 241.035(2). Meeting minutes must be available upon request 30 working days after adjournment of the meeting.

Supporting materials must be available to the public when provided to public body members. NRS 241.020(7).

Meeting must be recorded or transcribed. NRS 241.035(4).

If the meeting is transcribed by a court reporter, the court reporter gets his or her per page fee according to the contract with the public body. See NRS 241.035(5) and NRS 239.053.

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## Additional Requirements

Meeting minutes must be approved within 45 days or at the next meeting, whichever is later.

Recording of meeting must be kept at least one year. NRS 241.035(4)(a).

Minutes must be kept in conformance with NRS 241.035 and include:

- Date, time and place of meeting;
- Members in attendance;
- Substance of all matters proposed, discussed or decided; and
- Substance of remarks made by any member of public or their written remarks if requested.
- What about stacks of documents?
  - It depends. This is generally not a summary. But—
  - If a member of the public body asks that the material be included in the minutes, it should be included. NRS 241.035(1)(e).

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### Governing Bodies of Cities and Counties with a Population Greater Than 45,000 Must Upload Supporting Materials to its Website.



Material provided to the governing body during its meeting must be uploaded to its website within 24 hours of adjournment of the meeting.

The right of the public to request a copy of the material pursuant to NRS 241.020(5) & (7) is not eliminated.

Technical problems with the upload does not constitute a violation of the OML.

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### To Mail or not to Mail?



If a requester of supporting documents has agreed to receive supporting materials by **email** the public body shall, **if feasible**, provide it electronically, but this service is only **supplementary** to the right of the public to request materials over the counter.

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### State Notice Website

- As of July 1, 2014, this is a requirement for local governments.
- All meetings must be noticed on the State's official website, which is run by the Department of Administration.
- <https://notice.nv.gov/> or see Nevada's home page for the one-link click for access. Be sure to log in or contact Department of Administration for assistance with the upload of your URL where the public may find your agenda.




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Nevada Public Notice Website

Government Entity Public Body

State  
City  
County  
K-12  
Higher Education  
Special Districts

Residential Design  
Board of Athletic Trainers  
Board of Cosmetology  
Board of Dental Examiners  
Board of Dispensing Opticians  
Board of Examiners for Alcohol, Drug and Gambling Counselors

Advisory Commission on the Administration of Justice's Subcommittee on Victims of Crime  
Advisory Committee to Study Laws Concerning Sex Offender Registration  
Advisory Council for Prosecuting Attorneys  
Attorney General

Results for Attorney General

Subscribe to this public body's notice RSS feed

Results are limited to the last 7 days and for all dates in the future.

Today's Meetings

Subscribe to Today's Meetings RSS Feed

Notice	Date	Time	Status	Type
	12:00 AM			Workforce Innovation Opportunity Act Governance Team Workgroup

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 **Record of Compliance with Posting Requirement**

Each public body must make and keep a record of compliance with the statutory requirement for posting notice and agenda before 9a.m. of the third working day before a public meeting. The record is to be made by the person who posted a copy of the public notice and it must include: (1) date and time of posting, (2) address of location of posting, (3) name, title, and signature of person who posted the public notice.

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**Exceptions**

Closed sessions may be held by any public body to consider character, alleged misconduct, professional competence, or the physical or mental health of a person, with some exceptions, or to prepare, revise, administer, or grade examinations administered on behalf of the public body, or to consider an appeal by a person of the results of an examination administered on behalf of the public body. NRS 241.030.

Applicable NRS provision authorizing closed session must be included on the agenda.

Closed sessions may not be held:

- To discuss the appointment of any person to public office or as a member of a public body. NRS 241.030(4)(d); see also *City Council of City of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 784 P.2d 974 (1989).
- To consider the character, alleged misconduct, or professional competence of an elected member of a public body, or a person who is an appointed public officer or who serves at the pleasure of a public body as a chief executive or administrative officer or in a comparable position. NRS 241.031(1).

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## Public Comment Pitfalls

Restrictions must be reasonable "time, place, and manner" restrictions. NRS 241.020(2)(d)(7). NO-

- Halting comment based on viewpoint of speaker;
- Halting comment upon belief defamation is occurring; or
- Halting comment critical of public official.

But presiding officer may halt comments that become unduly repetitive or that stray from the scope of a specific agenda topic for which comment is offered, or halt conduct that is willfully disruptive. See *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266 (9th Cir. 1995); *White v. City of Norwalk*, 900 F.2d 1421, 1425-26 (9th Cir. 1990).

The OML does not "[p]revent the removal of any person who willfully disrupts a meeting to the extent that its orderly conduct is made impractical." NRS 241.030(4)(a).

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## Violations

Actions taken in violation of law are void. NRS 241.036.

The OAG has statutory enforcement powers under the OML and the authority to investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS 241.040.

When a violation of the OML occurs or is alleged, the OAG recommends that the public body make every effort to promptly correct the apparent violation. NRS 241.0365.

Although it may not completely eliminate a violation, corrective action can mitigate the severity of the violation and further ensure that the business of government is accomplished in the open.

Corrective action is prospective only. NRS 241.0365(4).

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## Violations

Corrective action requires that the public body engage in an *independent deliberative action* in full compliance with the OML. See, e.g., *Page v. MiraCosta Community College Dist.*, 102 Cal. Rptr. 3d 902, 930 (Cal. Ct. App. 2009); *Colorado Off-Highway Vehicle Coalition v. Colorado Bd. of Parks and Outdoor Recreation*, 292 P.3d 1132, 1137-8 (Colo. Ct. App. 2012); *Zorc v. City of Vero Beach*, 722 So.2d 891, 902-3 (Fla. Dist. Ct. App. 1998); *Gronberg v. Teton County Housing Authority*, 247 P.3d 35, 42 (Wyo. 2011).

A public body must clearly denote that corrective action may be taken at a meeting by placing the term "for possible corrective action" next to the appropriate agenda item. NRS 241.020(2)(d)(2).

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## Using Technology for a Meeting

Quorum of a public body using serial electronic communication to deliberate toward or make a decision violates law. NRS 241.016(4); *Del Papa v. Board of Regents*, 114 Nev. 388, 956 P.2d 770 (1998).

If technology is used to convene a quorum for a public meeting:

- There must always be a physical location for members of the public to attend the meeting. NRS 241.020(1).
- All the members of the public body and the members of the public who are present at the meeting must be able to hear or observe and participate in the meeting. NRS 241.010(2).
- That technology must not be not used to circumvent the spirit or letter of the OML. NRS 241.016(4).

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## Additional Points

Parliamentary procedure not addressed in OML - Duties of the presiding officer, recognizing speakers, motions and voting, making a clear record. See *Robert's Rules of Order* (11<sup>th</sup> ed. 2011).

Disclosure and abstention **prior to consideration of a topic** in conformance with Ethics in Government Law (NRS Chapter 281A). Abstain only in a clear case where the independence of judgment of a reasonable person in your situation would be materially affected by the conflict of interest disclosed. See NRS 281A.420; see also *Carrigan v. Commission on Ethics*, \_ Nev. \_, 313 P.3d 880 (2013).

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## The Impact of Social Media

- Use of Social Media by Government Agencies
- Personal Use of Social Media by Public Officials and Employees



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## Social Media for Agency Outreach

Many government agencies use several social media tools, including Facebook, Twitter and YouTube, to educate and inform the public about the latest news and initiatives of their offices and about trends and issues affecting their jurisdictions, in addition to working with the media.

Facebook, Twitter and YouTube are governed by separate Privacy Policies and Terms of Service. These policies apply to anyone's use of an agency's Facebook, Twitter or YouTube.

Any submission, including any deleted comment, may be deemed a "public record" for purposes of the NPRA.

Agencies should promulgate and enforce restrictions on the posting of inappropriate content to their social media.

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## Personal Use of Social Media

"[Defendant's] legitimate expectation of privacy ended when he disseminated posts to his "friends" because those "friends" were free to use the information however they wanted — including sharing it with the Government." *United States v. Meregildo*, 883 F. Supp. 2d 523, 525-526 (S.D.N.Y. 2012).

"If you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy. There is no proprietary interest in your tweets, which you have now gifted to the world." *People v. Harris*, 949 N.Y.S.2d 590, 597 (N.Y. Crim. Ct. 2012).

Teen's Facebook Post Costs Father \$80K Legal Settlement (Associate Press/NBC Miami, March 3, 2014).

Upon advice of counsel, Plaintiff deletes and then reactivates and "cleans up" his Facebook account for discovery; both are sanctioned for spoliation of evidence. *Allied Concrete v. Lester*, 736 S.E.2d 699 (Vir. 2013).

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## Integrate Social Media into Policies

Plaintiffs in personal injury cases have been compelled to produce non-public social media site data showing evidence contradicting allegations of injury. See *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010); *Richards v. Hertz Corp.*, 100 A.D.3d 728 (N.Y.2d Dept. 2012); *Fawcett v. Altieri*, 960 N.Y.S.2d 592 (Sup. Ct. 2013).

Develop a **social media policy** that covers use of Board social media accounts and covers appropriate use of personal social media accounts by Board members and staff; restrictions on:

- Photos or videos of the Board or staff
- Employment, job assignment, work hours, or other related information
- Profanity or unprofessional language and harmful images
- Derogatory comments or images about agency, superiors or coworkers
- Work-related matters or confidential info in posts, blogs, or microblogs

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## Attorney General Opinions

The Board may request written opinions on questions of Nevada law from the OAG pursuant to NRS 228.150. When relying on an Attorney General Opinion in good faith, the Board is protected from liability for damages against the governmental body it serves if the Opinion is later found to be incorrect. See *Cannon v. Taylor*, 88 Nev. 89, 91, 493 P.2d 1313 (1972).

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## Additional Resources

Nevada Board and Commission Manual –

[http://ag.nv.gov/uploadedFiles/agnv.gov/Content/Publications/Boards%20and%20Commissions%20Manual%20\(With%20Edits\).pdf](http://ag.nv.gov/uploadedFiles/agnv.gov/Content/Publications/Boards%20and%20Commissions%20Manual%20(With%20Edits).pdf)

Nevada Open Meeting Law Manual –

[http://ag.nv.gov/uploadedFiles/agnv.gov/Content/About/Governmental Affairs/OML Portal/2016-01-25 OML 12TH AGOMANUAL.pdf](http://ag.nv.gov/uploadedFiles/agnv.gov/Content/About/Governmental%20Affairs/OML%20Portal/2016-01-25%20OML%2012TH%20AGOMANUAL.pdf)

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